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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 148

PEOPLE OF THE STATE OF NEW YORK,
Appellee,

vs.

ERIC HASS,
Appellant

STATEMENT AS TO JURISDICTION

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, the above appellant files this separate statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of conviction appealed from herein, as follows:

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code as amended by the Act of January 1, 1928 (28 U. S. C. A., Sections 861(a) and 861 (b)), since this is a cause wherein a final judgment has been rendered or passed upon by the highest court of a State in which a decision could be had where is drawn in question the validity of a State statute on the ground that it is repugnant to the Constitution of the United States.

The date of the judgment of the Court of Appeals of the State of New York, the highest State court in which a determination could be had, is April 20, 1949, and the date of the judgment entered on its remittitur to the the Court of Special Sessions is May 10, 1949. The date upon which application for appeal is presented is May 10, 1949.

The State law whose validity is involved is Section 21 of Article 3 of the Rules and Regulations of the Department of Parks, City of New York, reads as follows:

> "No person shall erect any structures, stand or platform, hold any meeting, perform any ceremony, make a speech, address or harangue; exhibit any sign, placard, notice, declaration or appeal of any kind or description; exhibit to the public any dramatic performance, or the performance in whole or in part of any interlude, tragedy, comedy, opera, ballet, play, farce, minstrels, dancing, entertainment, motion picture, public fair, circus juggling, rope-walking or any other acrobatics, or show of any kind or nature; or, run or race any horse or other animal, or, being in a vehicle, race with another vehicle or horse, whether such race be founded on any stake, bet or otherwise; in any park or upon any park street, except by permit. "No parade, drill, or manoeuver of any kind shall be conducted, nor shall any procession form for parade or proceed in any park or park street without a permit, but no such permit shall be necessary for the use of the Parade Grounds adjacent to Prospect Park, Borough of Brooklyn, by organizations of the National Guard of the State of New York."

The cause is a prosecution by the appellee of the appellant charging him with violating the foregoing law in that he made a speech in a mall of a parkway under the jurisdiction of the Park Department without first having obtained a permit therefor. He was found guilty by the trial court and sentence was suspended.

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At the trial the constitutional validity of the law was challenged as being violative of the Federal Constitution.

At the end of the People's case and at the end of the entire case the appellant moved to dismiss the complaint on the ground that the law was unconstitutional. It is apparent too from the record that the single question raised by this case is the constitutionality of the law under the Federal Constitution.

The Appellate Part of the Court of Special Sessions upon appeal to it affirmed the judgment of the trial court, basing its decision upon a recent decision of the Court of Appeals of the State of New York in which the sole question was the constitutionality of the law, to wit, *People* v. *Nahman*, 298 N. Y. 95.

Thereafter, a judge of the Court of Appeals allowed an appeal to be taken to the Court of Appeals. That Court upheld the validity of the law and wrote an opinion, a copy of which is hereto annexed.

The question is a substantial one because the validity of this statute or a similar statute has never been passed upon. A review is necessary to set at rest serious questions concerning freedom of speech and assembly that were implied in this Court's decision in *Hague* v. *C. I. O.*, 307 U. S. 496. That the problem is a recurrent one and has been so since *Davis* v. *Massachusetts*, 167 U. S. 43, is indicated by the fact that the case of *People* v. *Nahman*, above, was decided by the Court of Appeals only in July 1948, and here we have the identical problem. Also, in June 1947, the highest court in Massachusetts in *Commonwealth* v. *Gilfedder*, 73 N. E. (2nd Series) 241, had the same where that Court more or less reversed the State decision out of which *Davis* v. *Massachusetts* arose. The *Nahman* case, unfortunately, never reached this Court. The defendants there abandoned further attempts of appeal after the decision of the Court of Appeals.

Because of the recurrence of this problem and its public importance this appeal raises a substantial question that should be reviewed by this Court.

Respectfully submitted,

EMANUEL REDFIELD,
Attorney for Appellant.

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EXHIBIT "A"

COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK, on the Complaint of Police Officer Eligio Sarro, *Respondent*,

vs.

ERIC HASS, *Defendant-Appellant*

CONWAY, *J.*:

This is an appeal by permission of a judge of this court from an order of the Appellate Part of the Court of Special Sessions of the City of New York, which affirmed a judgment of conviction of the Magistrates' Court of the City of New York convicting appellant of a violation of Sec. 21 of Article 3 of the Rules and Regulations of the Department of Parks, City of New York and suspending sentence therefor.

The facts are not disputed. On the night of October 1, 1948 a police officer found a number of men erecting a stand at Eastern Parkway and Utica Avenue in the Borough of Brooklyn, County of Kings, City and State of New York. After the stand had been erected the defendant mounted it and began to speak. The stand had been erected on the mall which separates the center driveway and the commercial driveway of Eastern Parkway. That mall constitutes the area between the two driveways mentioned and is twenty-five or thirty feet wide. Upon it there are trees, a pedestrian walk and two rows of park benches facing each other with about twenty benches in each row. There is another mall, also running east and west and also between the main driveway and the commercial driveway which carries traffic in the opposite direction. That mall also has forty benches in two rows facing each other. Each bench seats about six people so that on the two malls separated by the center or main driveway there is room on the benches for approximately four hundred eighty people. The trees in the mall have ornamental fences around them and are dedicated to deceased veterans of the past two wars.

As the defendant began to conduct his meeting some fifty people gathered at the front of the stand. The defendant

described himself as "a propagandist for our political campaign" and was espousing the candidacy of one Tigart of the Socialist Labor Party. The defendant said he was the editor of "The Weekly People" the official newspaper of that party.

After the defendant had been speaking for five or six minutes the police officer approached and asked if he had a permit from the Park Department permitting him to conduct the meeting. He said he did not and was thereupon served with the summons which led to his conviction.

The defense then established that Eastern Parkway is a busy street upon which the traffic is heavy.

The only other witness called on either side was an assistant to the assistant borough director for the Department of Parks in Brooklyn. It was one of his duties to issue permits for meetings. He testified without contradiction that, for the location at which the defendant spoke, there never had been a denial of a permit when application was made for one unless someone else had already applied for and obtained a permit for that location for the same period. He said that this was one of the two places in the Borough of Brooklyn which was considered by the Park Department to be a public forum or meeting place and at which it was felt that any type of ordinary meeting could be conducted. In fact, in his brief the defendant says "this location is a place designated by the Park Department for public speaking."

The defendant however urges that section 21 of Article 3 of the Rules and Regulations of the Department of Parks of the City of New York is unconstitutional and that therefore the order affirming the conviction must be reversed.

Section 21 reads as follows:

> "No person shall erect any structures, stand or platform, hold any meeting, perform any ceremony, make a speech, address or harangue; exhibit any sign, placard, notice, declaration or appeal of any kind or description; exhibit to the public any dramatic performance, or the performance in whole or in part of any interlude, tragedy, comedy, opera, ballet, play, farce, minstrels, dancing, entertainment, motion picture,

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public fair, circus juggling, rope-walking or any other acrobatics, or show of any kind or nature; or, run or race any horse or other animal, or, being in a vehicle, race with another vehicle or horse, whether such race be founded on any stake, bet or otherwise; in any park or upon any park street except by permit.

"No parade, drill, or manoeuver of any kind shall be conducted, nor shall any procession form for parade or proceed in any park or park street without a permit, but no such permit shall be necessary for the use of the Parade Grounds adjacent to Prospect Park, Borough of Brooklyn, by organizations of the National Guard of the State of New York."

Sanction for the foregoing regulation is found in chapter 21 of the Charter of the City of New York, sections 531, 532, 534 (*People* v. *Nahman*, 298 N. Y. 95). In that case after discussing sections 531 and 534 we said:

"The limits of the jurisdiction so granted are indicated in section 532 of the same chapter 21 of the city charter by these words: 'The commissioner shall have the power and it shall be his duty: * * * 3. To maintain the beauty and utility of all parks, squares, public places and playgrounds and other recreational properties, except those within the jurisdiction of the department of education, and to institute and execute all measures for the improvement thereof for ornamental purposes and for the beneficial uses of the people of the city.' This last charter provision brings to light the real character and meaning of the regulation in question. No power to suppress the publication of facts or opinions is thereby conferred and *the sole standard* of official action thereby countenanced is the promotion of the beauty and utility of the public parks of the city—an objective which undoubtedly goes far to secure the safety, comfort and convenience of a population of more than eight million people. A permit process adapted to these charter purposes—if administered without discrimination—is, in our judgment, an entirely admissible procedure."

The regulation is in essence a non-discriminatory provision having for its sole objective "the *safety*, comfort and convenience of the people of the city in their appropriate uses of its public parks" (*People* v. *Nahman*, supra, page 103, emphasis supplied.) In this case we have again the internal evidence supplied by the language of this long existing regulation, referring as it does to speeches and harangues, to the exhibition and distribution of signs and placards, the exhibition of dramatic performances whether of tragedy, comedy, opera or ballet, the running of races by horses or other animals or vehicles, and the parading, drilling or manoeuvering without a permit. Moreover, here we have proof in addition that a permit has never been refused when applied for on this mall or island *surrounded by heavy traffic* unless it has been preempted by someone else. Certainly there is no restriction or attempted restriction of civil liberties disclosed.

The order should be affirmed with costs.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 148.

ERIC HASS,

Petitioner,

—against—

PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR REHEARING.

EMANUEL REDFIELD,
Counsel for Petitioner,
60 Wall Street,
New York City.

THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 148.

ERIC HASS,

Petitioner,

—against—

PEOPLE OF THE STATE OF NEW YORK.

Petition for Rehearing.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Eric Hass by Emanuel Redfield his attorney respectfully shows:

That this is an application for a rehearing of the decision of this Court dismissing the appeal herein (Justices Black and Douglas, dissenting) on October 10, 1949. The dismissal was for want of a substantial federal question.

The purpose of this petition is to demonstrate fully that there is a substantial federal question. The jurisdictional statement is rather cryptic. Counsel was of the opinion that the federal question was so clear and substantial that there was no question of a review. Therefore, extreme brevity in presentation was made.

Petitioner respectfully calls this Court's attention to the following: The ruling in this case by this

Court's rejection is squarely contrary to its previous holdings in cases such as *Lovell* v. *Griffin,* 303 U. S. 444; *Cantwell* v. *Connecticut,* 310 U. S. 296; and the recent *Saia* v. *City of Lockport,* 92 Law. Ed. 1087. In these cases it was ruled and except for the instant case, seems to be firmly established that the necessity of obtaining a permit from a local official, *ipso facto,* renders such necessity void. The only modification to the rule exists in cases where the law provides procedural safeguards against the unlimited discretion of the official. For instance, after the Lockport ordinance was stricken down, the City of New York which had a similar ordinance, amended its law to provide the manner by which permits may be obtained, conditions to be met and the obligation of the official to issue the permit, if the conditions are met.

The reason for the broad rule is a salutary one. It is to safeguard against the acts of the administrative official. It is to prevent him from becoming a censor. It is to prevent him from preventing the utterance of ideas unpopular to him or to others.

This Court has gone so far in the protection of speech against the requirements of permits that it has stricken down permit ordinances even when the official has *not* abused the power. *Thornhill* v. *Alabama,* 310 U. S. 88. This Court held that the potentialities of censorship existed. That was sufficient reason for protection. In such cases it was held from experience that local public officials reject applications for speech permits because their views are unpopular, but justify their reasons behind a screen that has constitutional approval. Human beings are not endowed with faculties to pry into the minds for the hidden motives of officials.

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Let us apply these principles to the instant case. We will assume, at worst, the Court of Appeals has placed a clear construction on the ordinance in that by Chapter 21, Section 532 of the Charter of the City of New York, the limits of the jurisdiction of the commissioner extends to maintain the beauty of the parks and that he has no power to suppress the publication of facts or opinions (Jurisdictional Statement, p. 7, lower half). Nevertheless, this construction is merely surplusage and circuitous. It is no different from the ordinances in the *Lovell, Griffin* and similar cases. In all those cases the implied construction of the ordinance is that it is not to be used to suppress opinions. No official would admit otherwise. The implication always exists that speech is not to be thwarted. That is always the excuse given, along with the suggestion that the ordinance has never been used for such purposes.

But the question still remains not what has been done, but what can be done under the ordinance *Thornhill* v. *Alabama* (above). Even under the construction of the Court of Appeals an applicant for a permit can be denied it by the commissioner. He can be refused it with the excuse that he will destroy foliage, in the same manner as previously handbills were forbidden because they would litter the street. Yet this Court in *Schneider* v. *State*, 308 U. S. 147, held that littering was incidental. In so ruling this Court followed its decision in *Hague* v. *C. I. O.*, 307 U. S. 496, upholding the right to use the streets and parks for public speech without interference from a public official who required a permit for speech.

In those cases "littering of the street" was a rubric used to cover all situations. Now, from this case, the rubric will become "destroying foliage".

It is not unreasonable for one to argue that persons are entitled to enjoy the repose of woodland freed from daily harangues. Few will deny the public that convenience. Yet the interest may be balanced, with that of freedom of speech. Both can be accommodated at different places and times. But an ordinance must be framed with particularity so that the official may be governed by it, such as was suggested by Mr. Justice Douglas in the *Saia* case and which was followed by the City of New York.

Counsel also suggests to this Court that those of us at the Bar who are frequently engaged in free speech cases have been placed in confusion by the ruling in this case, since it is an about-face and at variance with the cases cited. Now we are not certain whether *Saia* v. *Lockport* and the cases cited in that case are still the law of the land. A clarification toward that end will serve the Bar and the public as well.

Dated: New York, N. Y., October 18, 1949.

Respectfully submitted,

ERIC HASS

By EMANUEL REDFIELD,
Counsel for Petitioner.

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Certificate of Counsel.

I, Emanuel Redfield, counsel for the above named petitioner, do hereby certify that the foregoing petition and application is presented in good faith and not for delay.

EMANUEL REDFIELD,
Counsel for Petitioner.

No. 148. HASS *v.* NEW YORK. Appeal from the Court of Appeals of New York. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. *Emanuel Redfield* for appellant. Reported below: 299 N. Y. 681, 87 N. E. 2d 68.